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No. 93-1462

In the  
Supreme Court of the United States

October Term, 1994

CALIFORNIA DEPARTMENT  
OF CORRECTIONS, et al.,  
*Petitioners,*

v.

JOSE RAMON MORALES,  
*Respondent.*

On Writ of Certiorari to the United States Court of  
Appeals for the Ninth Circuit

**BRIEF AMICUS CURIAE OF PACIFIC LEGAL  
FOUNDATION, JUSTICE FOR MURDER VICTIMS,  
VICTIM'S PAROLE ASSISTANCE, VICTIMS AND  
FRIENDS UNITED, MEMORY OF VICTIMS  
EVERYWHERE, SAVE OUR FUTURE, AND LOVED  
ONES OF HOMICIDE VICTIMS IN SUPPORT OF  
PETITIONERS**

RONALD A. ZUMBRUN  
\* ANTHONY T. CASO  
\*Counsel of Record  
Pacific Legal Foundation  
2151 River Plaza Drive,  
Suite 305  
Sacramento, California 95833  
Telephone: (916) 641-8888  
*Attorneys for Amici Curiae*

## TABLE OF CONTENTS

	Page
IDENTITY AND INTEREST OF AMICI .....	1
OPINION BELOW .....	5
STATEMENT OF THE CASE .....	5
SUMMARY OF ARGUMENT .....	7
ARGUMENT .....	9
I. IN ORDER TO VIOLATE THE EX POST FACTO CLAUSE, A LAW MUST BE RETROSPECTIVE IN APPLICATION AND DISADVANTAGE THE OFFENDER ..	9
A. The Statutory Amendment at Issue in This Case Is Being Applied Retrospectively .....	9
B. In Order to Satisfy the Disadvantage Requirement the Offender Must Show a Change in the Quantum of Punishment Resulting from Application of the Challenged Law .....	10
1. A Procedural Change May Work to the Disadvantage of an Offender Without Violating the Ex Post Facto Clause as Long as It Does Not Infringe upon Substantial Personal Rights .....	10

2. The Case Law Is Unclear as to What Constitutes an Increase in Punishment Sufficient to Violate the Ex Post Facto Clause . . . . .	11
II. AMENDMENT OF A LAW GOVERNING THE FREQUENCY OF PAROLE ELIGIBILITY HEARINGS TO PERMIT POSTPONEMENT OF ANNUAL HEARINGS WITHIN THE DISCRETION OF THE BOARD IS A MERE PROCEDURAL CHANGE AND NOT AN EX POST FACTO LAW . . . . .	16
CONCLUSION . . . . .	21

TABLE OF AUTHORITIES CITED

CASES

Akins v. Snow, 922 F.2d 1558 (11th Cir. 1991) . . . . .	13-14
Collins v. Youngblood, 497 U.S. 37 (1990) . . . . .	10-11
Cummings v. Missouri, 4 Wall 277 (1967) . . . . .	9
Dobbert v. Florida, 432 U.S. 282 (1977) . . . . .	10-11
Flemming v. Oregon Board of Parole, 998 F.2d 721 (9th Cir. 1993) . . . . .	17
Hopt v. Utah, 110 U.S. 574 (1884) . . . . .	9
In re Jackson, 39 Cal. 3d 464 (1985) . . . . .	9,16,19-20
Morris v. Castro, 166 Cal. App. 3d (1985) . . . . .	9,16,18
Rodriguez v. United States Parole Commission, 594 F.2d 170 (7th Cir. 1979) . . . . .	13-15
Roller v. Cavanaugh, 984 F.2d 120 (4th Cir.), cert granted, __ U.S. __ 124 L. Ed 2d 635, cert. dismissed, 510 U.S. __, 126 L. Ed. 2d 409 (1993) . . . . .	15

Page

Watson v. Estelle, 886 F.2d 1093  
(9th Cir. 1989) . . . . . 15

Weaver v. Graham, 450 U.S. 24  
(1981) . . . . . 7,9,11-17

STATUTES

Penal Code § 3041.5(b)(2) . . . . . 5,7,9,11

RULES

United States Supreme Court  
Rule 37 . . . . . 1

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IDENTITY AND INTEREST OF AMICI

Pursuant to Supreme Court Rule 37, Pacific Legal  
Foundation (PLF), Justice for Murder Victims, Victim's  
Parole Assistance, Victims and Friends United, Memory of



Victims Everywhere, Save Our Future, and Loved Ones of Homicide Victims respectfully submit this brief amicus curiae in support of petitioners, California Department of Corrections, *et al.* Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Justice for Murder Victims, Victim's Parole Assistance, Victims and Friends United, Memory of Victims Everywhere, Save Our Future, and Loved Ones of Homicide Victims are all California based organizations whose membership consists of crime victims, their families, and other concerned citizens. The mission of these groups is to provide support services for crime victims and their families, to ensure that existing victims' rights laws are zealously enforced, and to encourage the drafting of new legislation to further protect the rights of crime victims and improve public safety.

Amici are submitting this brief because they believe their public policy perspective and extensive efforts in support of the rights of crime victims will provide an additional viewpoint with respect to the constitutional issues presented. In particular, this Court should be aware of the tremendous impact that holding annual parole eligibility hearings has on the families who attend those hearings.

Typically, the families of murder victims must begin the financially and emotionally draining process of preparing for a parole eligibility hearing five to six months in advance of the hearing date by circulating petitions and requesting letters in opposition to release from friends and relatives, local public safety groups, and members of crime victims groups. Additionally, budget shortfalls have forced many counties to stop sending Deputy District Attorneys to parole hearings to represent the people. In such cases, the next-of-kin, who generally have no legal background, are forced to represent not only their own interests but those of general public safety as well. Finally, the families of victims must absorb the expense of both travel to the often distant prisons where the hearings are held and work time lost for hearing preparation and attendance. When annual hearings are required, one hearing is barely over before preparation for the next must begin. Amici believe that the lower court's opinion creates an unwarranted extension of the *ex post facto* clause that poses a serious threat to a state's ability to make any procedural modifications to its parole system and condemns the families of crime victims to annually relive their personal tragedies while preparing for and attending pro forma hearings for inmates who are seeking parole.

The personal impact of these hearings upon the survivors of murder victims is graphically illustrated by the individual stories of Betty Carlson and Harriet Salarno, co-founders of Justice for Murder Victims. Next Spring, Mrs. Carlson, who is in her late sixties, will attend the ninth parole hearing for her son's murderer, Angelo Pavageau. Pavageau was found guilty of breaking into Frank Carlson's home, savagely beating Mr. Carlson to death with a claw hammer, chopping block, and glass vase and brutally raping, torturing, and setting afire his wife Annette. At his trial, Pavageau, who was a Black Panther, described himself as a political prisoner and attempted to justify his acts in terms of class warfare. Suddenly, at his 1991 parole hearing, Pavageau's story changed and he tried to explain the crime

by claiming that he was involved in a homosexual affair with Frank Carlson and was a jilted lover who was suffering temporary insanity. These unexpected allegations, which were completely unsupported by any evidence, caused tremendous pain to Frank's mother who feels as if it is her family who is on trial every year when Pavageau has his eligibility hearing. Mrs. Carlson is unable to escape the agony of these crimes against her family, because preparation for the annual hearings takes up approximately two-thirds of her life and never allows enough time for the pain to heal.

Harriet Salarno and her family have attended four parole hearings for Steven Burns who murdered her 18-year-old daughter, Catina. Burns, who had been Catina's boyfriend, shot her execution style when she tried to break off their relationship. After the murder, Burns returned to his dorm room where he observed Catina slowly bleeding to death from his window while calmly watching Monday Night Football. The Salarno family's participation in Burns' hearings is particularly important, because Burns has been a "model" prisoner in the institutional setting where he has been able to avoid conflict and may seem like a good candidate for parole. Psychiatric reports diagnose him with a personality disorder, but this disorder, which manifests in an inability to deal with conflict in a nonviolent manner, has not been graphically illustrated since his murder of Catina. Mrs. Salarno's husband, Mike, describes the impact of the hearings as devastating and feels that the emphasis on the rights of the criminals turns the victims' families into the prisoners when they are forced to return and relive the crime year after year.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Morales v. California Department of Corrections*, 16 F.3d 1001 (9th Cir. 1994).

## STATEMENT OF THE CASE

In 1971, Jose Morales was convicted for the first-degree murder and mutilation of his girlfriend. After being transferred to a halfway house in April, 1980, he married a 75-year-old woman who had visited him in prison. Within two months of Morales' parole in May, his new wife had disappeared. Her body was never recovered, but one of her hands was discovered on the Hollywood Freeway three days after her family reported her missing. Morales pleaded no contest to the second degree murder of his wife and was sentenced to a term of 15 years to life in 1982. His earliest parole eligibility date was August 2, 1990.

On July 25, 1989, one year before Morales' earliest parole eligibility date, the Board of Prison Terms (BPT) conducted an initial parole consideration. At that time, Morales was found unsuitable for parole and his next hearing date was set for three years later. After the BPT's decision, Morales filed a petition for a writ of habeas corpus alleging that his rights under the ex post facto clause had been violated when his next hearing was deferred for three years and that he had wrongfully been denied parole.

Annual parole hearings are the norm under California's Determinate Sentencing Law (DSL), adopted in 1977, but California Penal Code § 3041.5(b)(2), as amended in 1981, gives the BPT the authority to defer parole hearings for multiple murderers for up to three years if the board determines that the prisoner will not become suitable for parole during the interim and submits a statement of findings



in support of that determination. Prior to 1977, criminals in California were sentenced under the Indeterminate Sentencing Law (ISL) which allowed the BPT to exercise similar discretion in deferring review of extreme cases.

The issue presented by this case is whether the BPT can defer parole hearings for felons who, like Morales, committed their crimes between 1977 and 1981 when the unamended DSL mandated annual review. In his petition for writ of habeas corpus, Morales argued that retrospective application of the 1981 amendment to defer his next parole eligibility hearing made his sentence more burdensome in violation of the ex post facto clause because it delayed the possibility of parole. The Department of Corrections defended the BPT's discretion as a mere procedural change that did not affect Morales' substantive rights.

The District Court denied Morales' petition. On appeal, the Ninth Circuit reversed holding that felons who committed their crimes between July 1, 1977, and December 30, 1981, under the unamended DSL, had received a punishment that included annual consideration for parole. The retroactive change allowing the BPT to consider multiple murderers for parole only once every three years eliminated the possibility of parole during the time between hearings and was thus found to make the sentences of these convicts more onerous in violation of the ex post facto clause. Therefore, the BPT was ordered to comply with the law as it existed at the time the crime was committed and grant Morales annual parole eligibility hearings. The Department of Corrections' petition for certiorari was granted by this Court on September 26, 1994.

## SUMMARY OF ARGUMENT

The 1981 amendment to California Penal Code § 3041.5(b)(2) authorizing the Board of Prison Terms to defer parole eligibility hearings for up to three years for inmates convicted of multiple murders on a finding that the inmate will not be suitable for parole during the interim is a mere procedural change and does not violate the constitutional prohibition of ex post facto laws.

In order to establish an ex post facto violation, this Court has mandated that an offender must show both that the law is applied retroactively and that he is disadvantaged by its application. *Weaver v. Graham*, 450 U.S. 24, 29 (1981). Procedural changes which do not affect an offender's substantive rights or change the quantum of punishment received do not violate the ex post facto prohibition. In this case, there is no question that the statute has been applied retroactively, the issue before the Court is whether or not Morales was disadvantaged by its application. In order to establish an ex post facto violation based on a change in the frequency of parole hearings, amici believe that an inmate should be required to show a realistic likelihood that he could have been granted parole had a hearing been held. Absent such a showing, the punishment is unaffected by the amendment and the change is merely procedural.

The court below made no such finding that Morales had any reasonable likelihood of being granted parole if he had been granted annual hearings and instead based its holding solely on the assertion that any law changing the frequency of parole eligibility hearings automatically violates the ex post facto clause. On the contrary, California decisions interpreting this statute made specific findings that the statute was designed to defer hearings only for those inmates with no realistic possibility of parole and that the

procedural protections attendant to parole eligibility hearings prevent the possibility that an inmate who has any likelihood of being granted parole will have his hearing deferred. In fact, a finding that Morales would not be suitable for parole before his next hearing was required in order for the BPT to justify postponement. Without a showing that Morales was actually disadvantaged by application of the amendment by losing a realistic opportunity to be paroled the judgment below is clearly erroneous and must be reversed.

In addition to the legal issues, this Court should balance the minimal impact that deferred parole hearings have on inmates with the devastating economic and emotional impact that ordering annual hearings will have on the families of crime victims. In addition to the trauma inherent in reliving the loss of a loved one on an annual basis, budget shortfalls in communities throughout California have resulted in a situation where the family of a victim often ends up as the sole representative of both their own personal interests and those of their community. As a result, these families annually incur tremendous expenses for hearing preparation and travel to the often distant prisons where the hearings are held. For these reasons, amici urge this Court to draw a bright line defining both the point where postponement of a parole eligibility hearing violates the ex post facto clause and the degree of disadvantage that an inmate must show to establish such a violation.

## ARGUMENT

### I

#### IN ORDER TO VIOLATE THE EX POST FACTO CLAUSE, A LAW MUST BE RETROSPECTIVE IN APPLICATION AND DISADVANTAGE THE OFFENDER

The ex post facto clause of the United States Constitution prohibits both Congress and the States from enacting any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *Weaver v. Graham*, 450 U.S. at 28 (quoting *Cummings v. Missouri*, 4 Wall 277, 325-326 (1867)). In *Weaver*, this Court laid out the two prong test that must be satisfied to establish that a criminal or penal law is ex post facto: "[1] it must be retrospective, that is it must apply to events occurring before its enactment, and [2] it must disadvantage the offender affected by it." *Id.* at 29. The Court went on to note that there is no ex post facto violation if the change to the law "is merely procedural, and does 'not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt.'" *Id.* at 29 n.12 (quoting *Hopt v. Utah*, 110 U.S. 574, 590 (1884)).

#### A. The Statutory Amendment at Issue in This Case Is Being Applied Retrospectively

Both the court below (*Morales*, 16 F.3d at 1003) and the California courts which have reviewed Penal Code § 3041.5(b)(2) (*In re Jackson*, 39 Cal. 3d 464 (1985); *Morris v. Castro*, 166 Cal. App. 3d 33 (1985)) agree that the law in question is undoubtedly being applied retrospectively. In an ex post facto analysis, the court examines the state of



the law at the time the crime was committed, and in this case California law required annual parole eligibility hearings when Morales killed his wife in 1980. *Morales*, 16 F.3d at 1003. Consequently, the only issue to be resolved in this case is whether or not retrospective application of the law as amended giving the BPT discretion to postpone parole hearings violates the ex post facto clause or is merely a procedural change in the law that lacks constitutional implications.

**B. In Order to Satisfy the Disadvantage Requirement the Offender Must Show a Change in the Quantum of Punishment Resulting from Application of the Challenged Law**

**1. A Procedural Change May Work to the Disadvantage of an Offender Without Violating the Ex Post Facto Clause as Long as It Does Not Infringe upon Substantial Personal Rights**

In *Dobbert v. Florida*, 432 U.S. 282 (1977), this Court stated that "[e]ven though it may work to disadvantage a defendant, a procedural change is not ex post facto." *Id.* at 293. Further guidance as to the meaning of a "procedural change" was provided by this Court in *Collins v. Youngblood*, 497 U.S. 37 (1990), where it held that a procedural change allowing reformation of improper jury verdicts did not violate ex post facto requirements because it did not change the definition of the crime or increase the punishment received. *Id.* at 44.

The *Collins* court explained that, even with regard to procedural changes, the purpose of the ex post facto prohibition was "to secure substantial personal rights against arbitrary and oppressive legislative action" but emphasized

that the clause was *not* meant "to limit the legislative control of remedies and modes of procedure which do not affect matters of substance." *Id.* at 46. The Court made it clear that merely labeling a law "procedural" does not immunize it from ex post facto scrutiny. A court must look beyond the form to determine whether or not the change "make[s] innocent acts criminal, alter[s] the nature of the offense, or increase[s] the punishment." *Id.* Essentially, then, a procedural change is one that does not violate these basic concerns of the ex post facto clause.

In this case, therefore, the issue is whether or not application of the 1981 amendment to Penal Code § 3041.5(b)(2) increased Morales' punishment. As this Court put it in *Dobbert*, Morales must show that application of the law resulted in an actual change in the "quantum of punishment." *Dobbert*, 432 U.S. at 294.

**2. The Case Law Is Unclear as to What Constitutes an Increase in Punishment Sufficient to Violate the Ex Post Facto Clause**

Thus far, this Court has not laid out a specific level of disadvantage or increase in punishment that an offender must show to establish that a given law is ex post facto. As a starting point, however, this Court stated in *Weaver* that "a law need not impair a 'vested right' to violate the ex post facto prohibition." 450 U.S. at 29 (footnote omitted). The Court went on to explain:

The presence or absence of an affirmative, enforceable right is not relevant, however, to the ex post facto prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Critical to relief

under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.

*Id.* at 30.

In other words, the primary purpose of the ex post facto clause is to insure that individuals have fair warning of the consequences of their actions and that they are able to rely on the legislative statement of those consequences until it is explicitly changed. *Id.* at 28. The key question then is not whether a prisoner's existing right to be released on a certain date is infringed by application of the new law, but whether the provision "substantially alters the consequences attached to a crime already completed, and therefore changes 'the quantum of punishment.'" *Id.* at 33 (citation omitted).

Applying this standard, the *Weaver* Court held that a state statute which reduced an inmate's ability to earn automatic "gain time" credits based solely on good conduct constricted the inmate's ability to earn early release making the punishment more onerous for a crime committed before its enactment and thereby running afoul of the ex post facto prohibition. *Id.* at 36. Although the statute in *Weaver* did not impair a specific right to early release, the Court found sufficient disadvantage in that the inmate's opportunity to shorten his time in prison simply by following the prison rules and adequately performing his assigned tasks was reduced. *Id.* at 34. Under *Weaver*, then, while a prisoner need not conclusively show that application of a law will definitely make his sentence longer, he must at least establish that it results in the loss of a real opportunity for early release.

A series of cases in the Circuit Courts have attempted to further define the exact degree of disadvantage required to establish an ex post facto violation in the context of amendments to parole regulations. In *Rodriguez v. United States Parole Commission*, 594 F.2d 170 (7th Cir. 1979), which was cited in *Weaver* (450 U.S. at 32), the court ruled that ex post facto was violated where retroactive application of a regulation denied a prisoner "any meaningful opportunity for parole." 594 F.2d at 176. In that case, the prisoner had been sentenced to a two-year term in federal prison and was immediately eligible for parole. *Id.* at 170. The regulations in place when the crime was committed called for an immediate eligibility hearing followed by a second hearing one-third of the way into the sentence, while the revised regulation mandated review every 18 months. *Id.* at 172. Based on findings that inmates were rarely given a parole date at the initial hearing but that parole dates were frequently awarded at hearings held one-third of the way into short sentences, the court found that retroactive application of the regulation placing review at 21 months into a 24-month sentence was clearly to the inmate's "substantial disadvantage" and precluded any "meaningful opportunity for parole." *Id.* at 175-76. Under the former regulation, the inmate had a realistic chance of getting a parole date eight months into his two year sentence. Application of the revised regulation eliminated that possibility.

More recently, the Eleventh Circuit extended the logic of *Rodriguez* to find an ex post facto violation where the amended regulation changed review from mandated annual hearings to a requirement that hearings be held at least every eight years. *Akins v. Snow*, 922 F.2d 1558, 1560 (11th Cir. 1991). In *Akins*, the court did not make any findings regarding the likelihood of parole being granted if hearings had been held. Instead, the court based its decision on the mere supposition that, since a prisoner can't get a parole date



without an eligibility hearing, altering the time period between hearings increases the time an inmate must spend in prison before he is eligible for parole. *Id.* at 1564. The court cited *Rodriguez* for support of this proposition:

Eligibility in the abstract is useless; only an unusual prisoner could be expected to think that he is not suffering a penalty when even though he is eligible for parole and might be released if granted a hearing, he is denied that hearing." [594 F.2d at 176.] ... *Rodriguez* implies that without the opportunity for a parole hearing an inmate is not, in any realistic meaning of the term, eligible for parole.

922 F.2d at 1562. Up to this point, this was a fair reading of the underlying logic of *Rodriguez*, but the *Akins* court took this statement completely out of its factual context when it went on to say:

We realize that *Rodriguez* involved a change that effectively eliminated all opportunity for parole release, but we think the specific disadvantage is incidental. The key to the court's conclusion was that *Rodriguez* was deprived of an opportunity for parole that existed prior to the alteration of the parole rules.

*Id.* Thus *ipse dixit* the *Akins* court expanded the application of the ex post facto clause from a case where the court found that the prisoner had a reasonable expectation of parole if a hearing had been held to find an ex post facto violation on the mere supposition, unsupported by any findings, that more

frequent parole hearings *might* result in an opportunity for parole.

Such a bare supposition cannot possibly establish the loss of a real opportunity for early release as required by *Weaver*, but, in the past year, two more circuits, including the Ninth Circuit in the decision below, have cited this erroneous extension of *Rodriguez* as authority for holdings that amended parole laws allowing postponement of eligibility hearings for violent offenders for two to three years were ex post facto laws rather than mere procedural changes based solely on the unsupported assertion that the prisoner *might* have lost an opportunity for parole. *Roller v. Cavanaugh*, 984 F.2d 120, 123 (4th Cir.), *cert. granted*, \_\_\_ U.S. \_\_\_ 124 L. Ed 2d 635, *cert. dismissed*, 510 U.S. \_\_\_, 126 L. Ed. 2d 409 (1993); *Morales*, 16 F.3d at 1004. This is surely the sort of holding warned against by the Ninth Circuit when it stated in another context that "[t]he ex post facto clause is not concerned with fiction." *Watson v. Estelle*, 886 F.2d 1093, 1096 (9th Cir. 1989).

Amici urge this Court to stop the Circuit Courts from relying on "fiction" by drawing a bright line defining the point at which, if ever, postponement of a parole eligibility hearing runs afoul of the prohibition against ex post facto laws and the degree of disadvantage that an inmate must prove to establish such a violation. A requirement that the inmate show a realistic possibility of being granted parole if a hearing had been held is in line with the goals of giving fair warning of penalties and restraining arbitrary or vindictive legislation. This would not require the inmate to prove impairment of a "vested right," but would simply require a showing of an actual lost opportunity rather than a mere supposition that having more eligibility hearings equates with increased possibilities of parole irrespective of the actual likelihood of release.



## II

**AMENDMENT OF A LAW GOVERNING THE  
FREQUENCY OF PAROLE ELIGIBILITY  
HEARINGS TO PERMIT POSTPONEMENT  
OF ANNUAL HEARINGS WITHIN  
THE DISCRETION OF THE BOARD IS  
A MERE PROCEDURAL CHANGE AND  
NOT AN EX POST FACTO LAW**

In 1985, the California Court of Appeal held that both the amendment at issue in this case (authorizing the BPT to defer parole eligibility hearings for multiple murderers for up to three years on a finding that the prisoner is not reasonably likely to be found suitable for parole before the next hearing date) and the related 1982 amendment, which authorized the BPT to defer the next hearing for any prisoner for up to two years on the same finding, were merely procedural changes which neither increase punishment nor impair a substantial right. *Morris*, 166 Cal. App. 3d at 38. The same conclusion was reached by the California Supreme Court five months later as to the 1982 amendment. *Jackson*, 39 Cal. 3d at 472. Although the California Supreme Court did not pass judgment on the 1981 amendment, which was not at issue in the case, it noted that the appellate court's holding in *Morris* was consistent with its decision. *Id.* at 472 n.8.

While the court below was not bound by the California courts' determination, because the issue of "[w]hether a retrospective state criminal statute ameliorates or worsens conditions imposed by its predecessor is a federal question" (*Weaver*, 450 U.S. at 25), the reasoning of the California cases is compelling. This is particularly so when contrasted with the conclusory statement of the court below:

By increasing the interval between parole hearings, the state has denied Morales opportunities for parole that existed under prior law, thereby making the punishment for his crime greater than it was under the law in effect at the time his crime was committed. Logic dictates that because a prisoner cannot be paroled without first having a parole hearing, a parole hearing is a requirement for parole eligibility. [Citing *Akins*, 922 F.2d at 1562.] Accordingly, any retrospective law making parole hearings less accessible would effectively increase the sentence and violate the ex post facto clause.

*Morales*, 16 F.3d at 1004. Not only did the court below fail to make any finding that Morales had any reasonable likelihood of being granted parole if he had been given a hearing in the interim, the court specifically stated that such a finding was irrelevant. *Id.* at 1005. The Ninth Circuit cited its earlier decision in *Flemming v. Oregon Board of Parole*, 998 F.2d 721 (9th Cir. 1993) (ex post facto violation where maximum sentence reduction decreased from 31.6 months to seven months under new regulation), in support of this assertion, but the facts of *Flemming* make it clear that the case is not on point. Although *Flemming* was not required to "show definitively that he would have gotten a lesser sentence," he did conclusively show that he lost a real opportunity to have his sentence reduced under the new regulation. *Id.* at 725. Morales can make no such showing in this case.

The California decisions, on the other hand, satisfy the second prong of *Weaver* by making specific findings that prisoners in the same position as Morales were not

disadvantaged by application of the law. In *Morris*, the Court of Appeal found:

The amended statute grants the board discretion to defer the otherwise annual suitability hearings for two or three years for certain life inmates when the board finds that it is not reasonably likely that the prisoner would be found suitable for parole within the next year. In other words, the board has determined the prisoner will pose an unreasonable risk of danger to society if released.

This is no arbitrary decision, but is made only after a full hearing and review of the prisoner's past criminal history, the nature of the commitment offense, his attitude towards the current crime, his institutional behavior, rehabilitation and psychological problems, if any, his age, and whether the prisoner has realistic parole plans or has developed a marketable skill.

166 Cal. App. 3d at 38 (citations omitted). The *Morris* court found that the amended statute had no impact on the prisoners' substantive rights because it did not change the guidelines for determining suitability for parole and there was "no suggestion that respondents would have been granted early release even if the hearings were heard annually." *Id.* at 40. Consequently, the changes were ruled to be procedural and not in conflict with the ex post facto clause. *Id.*

In *Jackson*, the California Supreme Court noted legislative findings with regard to the 1982 amendment to support its conclusion that "the likelihood that the postponement actually delays release on parole until after the next hearing appears slight." 39 Cal. 3d at 473. Specifically, the court found that 90% of inmates are found unsuitable for parole release at the first eligibility hearing and that approximately 85% of inmates are found unsuitable at the second and succeeding hearings. In view of these statistics, the California Legislature saw the amendment "as a means 'to relieve the [Board] from the costly and time-consuming responsibility of scheduling parole hearings for prisoners who have no chance of being released.'" *Id.* (citations omitted; emphasis added; brackets in original).<sup>1</sup>

In addition to the finding that parole was unlikely in any case, the *Jackson* court found additional support for its decision that the amended statute was only a procedural change that didn't impair a prisoner's substantive rights in the extensive procedural rights which inmates have at an eligibility hearing:

These rights are in place to guard against arbitrary or erroneous decisions, and to ensure that the inmate receives "due consideration" of his or her present suitability for parole.

---

<sup>1</sup> While these findings relate specifically to the 1982 amendment, and not to the 1981 amendment which is at issue in this case, note that the later amendment, and the statistics cited, apply to all inmates and not just those with multiple murder convictions who are covered by the earlier amendment. In light of the wide range of sentences necessarily included in these findings, the statistics almost certainly represent a conservative estimate of the likelihood of parole for an inmate in Morales' position.



Paramount among these are the right to reasonable assistance in preparing for the hearing, and in the case of life prisoners, the right of counsel at the hearing. Both rights provide an inmate with a meaningful opportunity to argue for a finding of suitability, and, failing that, against a postponement. Section 3041.5 also requires that any postponement of annual review be justified with a statement of reasons. Together, these guarantees act as insurance that any postponement decision be well-founded.

*Id.* at 473-74.

In this case, Morales was sentenced to a term of imprisonment of 15 years to life and his earliest possible parole date was August 2, 1990. When the BPT held his initial parole consideration hearing in July of 1989, it applied the criteria set forth above and determined that Morales was not suitable for parole because the commitment offense was carried out in a particularly heinous manner, he had an unstable social history including an escalating pattern of criminal conduct and violence, he had committed his second murder while on a previous grant of parole, and he had failed to participate in therapy necessary to help him face and deal with his crime. In summary, the Board found that Morales would pose a threat to public safety if released on parole. Additionally, the Board made a specific finding that it was unreasonable to expect that parole could be granted at a hearing scheduled earlier than three years in the future because his past criminal behavior and recent psychiatric evaluations indicated the need for a longer period of observation and treatment before a parole date could be projected. Based on these findings, the Board determined

that the next hearing should be scheduled three years in the future. Petition for Certiorari at 6 n.2 (quoting parole suitability report dated August 22, 1989).

Far from being an oppressive ex post facto law, the California decisions make it clear that the amended law at issue in this case is a well thought out legislative response to the wasted time and money consumed by holding annual eligibility hearings for inmates who have no chance of parole. This amendment neither changed the parole suitability guidelines nor increased the punishment that Morales was given for his crime. Furthermore, the procedural protections built into the statute insure that a prisoner in Morales' position will not be denied an annual hearing if there is any realistic possibility that he would be granted parole at a hearing the following year thus guaranteeing that the quantum of his punishment will not be changed. As noted above, Morales was considered for parole at the earliest possible date and specific findings were made that he was not suitable for parole at that time and would not be for a period of at least three years into the future. Contrary to the holding of the court below that actual likelihood of parole being granted is irrelevant, such a finding is mandated by this Court's decision in *Weaver*. Absent such a finding, and in light of the fact that specific findings of unsuitability were required from and made by the BPT to justify postponement, the lower court's ruling that the amendment constituted an ex post facto law as applied to Morales is clearly erroneous and should be reversed.

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## CONCLUSION

Our constitutional protection against ex post facto laws is one of the key defenses of our personal freedoms. Everyday life would have little predictability if we all lived in fear of today's innocent behavior being made criminal



tomorrow. The ex post facto clause does not exist in a vacuum, however, and our legislatures must be given the ability to adapt to societal change and to put programs that aren't functioning properly back on track. When a parole system mandates annual eligibility hearings for the most violent offenders, offenders who are demonstrably unsuitable for parole, the cost to society is immense. This cost falls in part on the state, in the form of the direct costs associated with holding the hearings, and in part on the families of victims who, in addition to the sizeable financial costs of preparation for and travel to the hearings, suffer the even greater emotional cost of annually reliving the murder of a loved one while preparing for and attending hearings to prevent the early release of the murderer. In exchange for these costs, there is no benefit to anyone when both the prisoner and the board know that there is no realistic likelihood of parole being granted.

When the California Legislature saw this problem, it acted to solve it by giving the Board of Prison Terms the discretion to defer parole hearings for multiple murderers upon a finding that the prisoner will not be suitable for parole during the next two or three years. This statutory change was carefully thought out and the procedural protections in place guarantee that no prisoner will wrongfully be denied any realistic opportunity to be granted parole. Surely such a law, which solves a serious problem while harming no one should not be struck down on the unsupported supposition, contrary to the facts and this Court's precedent, that any delay of parole eligibility hearings automatically violates the ex post facto clause. Adopting the requirement that an inmate must show a realistic possibility of being granted parole if a hearing had

been held will prevent this unwelcome result. Amici therefore urge that the decision of the Court of Appeal for the Ninth Circuit be reversed.

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Respectfully submitted,

RONALD A. ZUMBRUN  
 \* ANTHONY T. CASO  
 \*Counsel of Record  
 Pacific Legal Foundation  
 2151 River Plaza Drive,  
 Suite 305  
 Sacramento, California 95833  
 Telephone: (916) 641-8888

*Attorneys for Amici Curiae*